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ABSTRACT

A libel suit for which the ruling hung on determination of the plaintiffs as public or private figures is described in this paper. First, the paper describes the case, in which an Oregon newspaper reported that an antique dealer and the local bank president had systematically swindled a citizen out of several hundred thousand dollars, and for which the accused charged libel. The paper notes that the 7.4 million dollar lawsuit dragged on for eight years, and was settled out of court, apparently for the plaintiffs, without ever addressing the truth or falsity of the allegations. The paper then explains how, during the course of the legal battle, the bank and its president were judged to be a private figure, and that the newspaper was denied "actual malice" protections. Cases cited by the defense as precedent for a public figure ruling and that were rejected by the court, are reviewed, including "Sullivan versus New York Times," and "Gertz versus Robert Welch," and the paper argues that the bank and its president did, in fact, qualify as a public figure. The paper concludes by examining the "abysmal" state of press protections from libel litigation, noting the conflicting values present in the various Supreme Court rulings, and that the lack of clear and consistent national guidelines encourages litigation without serving the interests of truth. (Three pages of notes are included, and a brief discussion of more recent federal cases that have called for a rethinking of the libel standards is appended.) (HTH)

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Willamette Week and the Bank of Oregon: Stalking the Corporate Public Figure

INTRODUCTION

In July of 1977, Dick Cross, the owner of a chain of successful hair salons, visited the news offices of Willamette Week, a Portland-area weekly newspaper. Cross was a man in search of a forum. He spent four hours unfolding a tale of alleged financial chicanery and behind-the-scenes maneuvers involving an antique dealer and a local bank president who, he claimed, fleeced him of $343,000. His business was in receivership as a result. His personal finances were ruined. His hair-care empire was in shambles.

Cross' tale, and the documentary evidence he provided, set in motion a month-long investigation by the newspaper that culminated in an Aug. 28, 1978 lead story entitled "A Lot off the Top." The expose would ultimately embroil the Willamette Week, publisher Ronald Buel and editor Richard Meeker in a $7.4 million libel suit that would drag on for eight years, cost untold thousands of dollars in legal fees, and end in out-of-court settlement without ever having directly addressed the truth or falsity of the allegations.

The Willamette Week article charged, among other things, that:

-- Homer "Spike" Wadsworth, president of the Bank of Oregon, and Wilburn Duncan, proprietor of Duncan's Antiques "conspired to use

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Cross' credit from a profitable haircutting business to their advantage."

-- The bank which Wadsworth controlled "...was excessively loose, if not unscrupulous in its dealings with Cross."

-- Some unnamed person at the bank "...forged Cross' initials on notes transferring $150,000 of funds from the hair salon account at the Bank of Oregon to Duncan's account there." (1).

The allegation of forgery was the most serious charge. The Willamette Week quoted a report by Dorothy Lehman, a graphologist or handwriting expert, who examined copies of the authorization forms:

> ...there is absolutely no question, in my opinion, that the three disputed signatures R El. C could not have been executed by the same individual who executed the genuine signatures of Richard El. Cross. ...the photocopies reveal many indications of forgery. ...I would have little difficulty proving the validity of my findings in a court of law. (2).

Meeker and Buel, who investigated and wrote the story, also claimed to have uncovered unrelated "'...insider' transactions by Wadsworth with his bank that automatically raise a series of ethical and legal questions." (3).

The article noted several unsuccessful attempts to contact Wadsworth for his response to the allegations. Other officials at the Bank of Oregon, acting on the advice of legal counsel, declined to answer questions. After publication, lawyers for Wadsworth and the Bank of Oregon contacted Willamette Week, demanding a retraction of virtually every paragraph of the story. The paper promised to correct any statements shown to be factually incorrect. When the bank failed to respond, the Willamette Week refused to print a retraction.

"We did that story carefully," Richard Meeker recalled, "We knew there was a high likelihood of a lawsuit so we had our lawyer read it beforehand. That meant we were all that more careful." (4).

Wadsworth and the Bank of Oregon filed the complaint against Buel, Meeker and the Willamette Week on Aug. 3, 1979, demanding $7.4 million for damages resulting from defamation.

The Willamette Week article dealt with a subject of unquestionable public importance -- the financial activities of a local bank and its president. Yet in the ensuing legal battle, the bank was judged to be a private figure and the newspaper was denied the actual malice protections designed by Times v Sullivan (5) to encourage robust discussion on matters of public concern.

The Willamette Week case is a direct consequence of the unresolved priorities of constitutional libel law as it has evolved in United States Supreme Court decisions from Times v Sullivan through Rosenbloom v Metromedia (6) and Gertz v Robert Welch (7). The Court, in recognizing the importance of a free press, has sought -- some say unsuccessfully -- to reconcile the need for press protections with the individual's right to compensation for damage due to defamation.

The Court has vacillated between focusing its analysis on the nature of the speech, on one hand, and the status of the individuals on the other. In the absence of clear definitions and consistent guidelines, the lower courts have had to find their own way through the morass.

Willamette Week is a case study in the unresolved resolved status of a corporation -- in this instance a bank -- in libel litigation involving the press. This paper will examine the evolution of the case and discuss its implications on the press' ability to fulfill its public responsibility. The concluding section will suggest a possible judicial remedy.

BANK OF OREGON v INDEPENDENT NEWS INC.

Lawyers for Wadsworth and the Bank of Oregon accused the paper of 46 statements of libel. The period of discovery lasted two years. In Oct., 1981, Judge Richard Unis, Circuit Court Judge, Multnomah County, granted the defendants' motion for summary judgment and ruled that, although the bank and its president were not public figures, "gross negligence" was the proper standard of fault. Gross negligence is the functional equivalent of actual malice as defined by New York Times v Sullivan. (8).

The plaintiffs appealed. On Oct. 12, 1983, the Oregon Court of Appeals reversed the lower court ruling, concluding by a unanimous decision that Wadsworth and the Bank of Oregon were private figures for purposes of defamation and that negligence was the proper standard. (9).

The Supreme Court of the United States has never directly addressed the issue of whether a corporation is a public or a private figure for purposes of defamation. It remains an area of vague boundaries and constantly shifting definitions. Nevertheless, there is a substantial body of case law at both the federal level and various state appellate levels that can provide a bit of guidance.

The Oregon Court of Appeals, however, chose to ignore the arguments of the defendants which were based on such an approach. The Court relied instead on a narrow interpretation of Gertz v Robert Welch (10) and a First Circuit Court of Appeals decision, Bruno & Stillman v Globe. (11).

The Gertz decision defined public figures as those who "...have voluntarily exposed themselves to increased risk of injury..." by having accepted public office or having assumed "...an influential role in ordering society." (12). Private figures were deemed more vulnerable to injury by defamation and thus more deserving of protection.

This analysis, of course, is based on the premise that an individual as a human being has an inherent right to reputation and dignity. The validity of applying such an analysis to an entity, such as a corporation, which possesses no human attributes and cannot experience pain, anguish or emotional stress, is questionable.

Nevertheless, the Court of Appeals concluded that the bank and its president were private figures. The plaintiffs had not thrust themselves into a public controversy -- the only controversy that existed was the one created by the news story -- and they did not enjoy the kind of easy access to the media that public figure status would warrant.

The defendants argued that a bank is a public figure by virtue of the fact that it is a publicly-held banking corporation subject to extensive state and federal regulation. Citing Bruno & Stillman v Globe, the Court dismissed that argument out-of-hand:

> We conclude that the bank, like the corporate plaintiff in Bruno & Stillman v Globe ...is a "paradigm middle echelon, successful" business and is not a public figure by reason of engaging in that business. (13).

The Court paid little heed to the public-interest rationale of the defendants. It chose instead to rest its entire analysis upon the more tenuous foundation of Bruno & Stillman.

The plaintiffs in that case were engaged in the manufacture and sale of ocean-going boats and they brought action against the Boston Globe for a series of reports which questioned the quality and hence the seaworthiness of their product. Because of the nature of the enterprise, Bruno & Stillman, Inc., was judged to be a private figure.

The defendants claimed that a bank is a different breed of corporate animal. A bank's involvement in public affairs, they argued, goes far beyond that of a business engaged merely in the manufacture and sale of a line of consumer goods. And banking deserves, as a consequence, less protection from public scrutiny. It is entrusted, under strict state and federal regulations, with the savings of hundreds, perhaps thousands of citizens. By its very nature then, a corporate entity such as the Bank of Oregon, plays an "influential role in ordering society," the essence of the public figure definition established by Gertz. (14).

Both the Court of Appeals and the Oregon Supreme Court chose to ignore this argument.

The Oregon Supreme Court delivered its five-to-one ruling on Jan. 8, 1985. Justice Linde, a long-time friend of the family of defendant Richard Meeker, did not participate in the decision. Justice Roberts filed a lone dissent, upholding the defendants'

contention that the Bank of Oregon was a public figure. Justice Campbell authored the majority opinion.

Campbell, like Richardson in his opinion for the Court of Appeals, chose a hobbled interpretation of Gertz to provide the rationale for the Supreme Court position. The bank was judged to be a private figure because:

-- It did not "exhibit 'pervasive involvement in the affairs of society.'"

-- It did not have "'general fame or notoriety' in the community."

-- Corporate status alone was not enough to warrant public figure status:

> Merely opening one's doors to the public, offering stock for public sale, advertising, etc., even if considered a thrusting of one's self into matters of public interest, is not sufficient to establish that a corporation is a public figure. (15).

The Court rejected as inapplicable the cases cited by the defense. Martin Marietta v Evening Star Newspaper held that corporations are public figures because the Gertz analysis applies only to individual persons. (16). Thus corporate activities involving matters of public interest are entitled to the actual malice standard. The Court dismissed that rationale because it would require courts to define public interest: "... it involves courts in determinations of whether speech is of public concern or interest to too great a degree." (17).

Coronado Credit Union v KOAT Television considered a credit union to be a public figure because it engaged in activities that attracted public interest and because it was subject to broad state

and federal regulation. (18). The Oregon Supreme Court rejected that analysis in favor of a narrow interpretation of Gertz. The majority ignored the public interest aspect and narrowed its focus instead to the status of the bank: Since the bank had not injected itself into a public controversy, it was not a public figure.

Justice Roberts, the lone dissenting voice on the Court, took a more favorable view of the defendants' position and agreed that the Bank of Oregon met the requirements of public figure status. Roberts based her opinion in part on the Martin Marietta rationale: if the Gertz definition of "public figure" was intended to determine whether a person, through his involvement in public affairs, had given up his claim to a private life, how could such a standard apply to a corporate entity which "...never has a private life to lose?" (19).

Roberts also relied on Coronada to conclude that a corporation, by going public, takes a voluntary step which necessarily invites public scrutiny of its activities. Moreover, corporations subject to governmental regulation, such as banking, must anticipate heightened public interest. She cited two additional cases -- one federal, one state -- to buttress her argument.

In American Ben. Life Ins. Co. v McInture, the Supreme Court of Alabama held an insurance company to be a public figure because of its regulation by governmental agencies and because of its general pervasive influence in society. (20). Reliance Insurance Co. v Barron's held an insurance company to be a public figure because of its voluntary decision to make a public stock offering. (21).

Roberts concluded that, while not all corporations would fit the public figure model she advocated, the Bank of Oregon, by her analysis, did:

> Banking is a pervasively regulated business in which public scrutiny is the norm. Defendants' article questioned the integrity of certain financial transactions of plaintiff bank, a topic of which public review is anticipated. (22).

Roberts' concluding statement cuts to the heart of the case: the purpose behind the constitutional privileges enshrined in Sullivan v New York Times, that is, the encouragement of unrestrained speech in all matters of vital public importance. (23). This is the central issue in Bank of Oregon v Independent News.

Bruce Smith, attorney for the defense, raised the question in his original petition before the Supreme Court:

> ...the determination of whether a plaintiff is a public figure is intertwined with and inseparable from the question which underpins the entire public figure/private figure dichotomy: is the published speech sufficiently important to merit constitutional protection? (24).

To fully comprehend the legitimacy of a bank as a public figure, it is essential to look to the intent of Sullivan v New York Times and to briefly examine the evolution of libel law through the subsequent U.S. Supreme Court decisions. Attorneys for the defendants argued the logic and necessity of this approach in their unsuccessful petition for a rehearing of the Oregon Supreme Court decision:

> If the category of "public figure is to have meaning, the news media must be able to know in advance who fits within the category. Such knowledge can only result from an analysis that is based upon the policies which underly the category. (25).

Such an examination also provides a kind of roadmap of the

Supreme Court's constantly shifting emphasis from the nature of speech to the status of the subject of that speech. It is a travelogue marked by judicial vacillation and unreconciled priorities.

New York Times v Sullivan was the Court's initial attempt to accomodate two conflicting values -- the right of an individual to redress through the tort of defamation and the Constitutional right of the press to freely examine important public issues. The Court, on that occasion, leaned in favor of the press and stressed the importance of the nature of the speech involved. The Court, in acknowledging a "...profound national committment to the principle that debate on public issues should be uninhibited, robust and wide-open," ruled that a newspaper could not be held liable for a false story about the official conduct of a public official unless the plaintiff could prove that the newspaper acted with actual malice. (26).

Unbridled discussion of public issues was deemed so important that the Court constitutionalized this privilege in order to provide "breathing space" and to preclude self-censorship by the press. (27). The Sullivan guidelines, then, required that the speech be on matters of public interest involving public officials.

Subsequent cases in the 1960's extended the malice standard to include "public figures" as well as public officials. In two companion cases, Curtis Publishing v Butts and Associated Press v Walker, the Court found the plaintiffs to be public figures because they commanded continuing public interest and because they were

judged to have sufficient access to the media to argue their point of view in a defamation controversy. (28). The Court placed greater emphasis in these cases on the status of the individuals rather than the nature of the speech involved.

The Supreme Court made a radical departure four years later in Rosenbloom v Metromedia (29). In a fractured plurality decision in which five opinions were written, none commanding more than three votes, the Court abandoned the status-based approach in favor of a public-interest standard in the determination of liability. The Court extended the Times v Sullivan actual malice standard to all matters of public concern regardless of the status of the participants. Justice Brennan's opinion came as close as any to synthesizing the Rosenbloom rationale:

> "The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety. (30).

But the transcendent status of speech on matters of public concern did not stand long. The plurality opinion was an uneasy alliance from the start and it soon wobbled and collapsed from the lack of strong consensus. Nessa E. Moll observed in Hofstra Law Review:

> Read together, (the) Rosenbloom opinions illustrate the prevailing tension between conflicting values in prior cases; a democracy's need for full and uninhibited debate of important public issues versus traditional tort law concepts which permit the individual to recover when harmed by the acts of another. (31).

With Gertz v Robert Welch, the Court attempted to reconcile these warring priorities and so retreated from the public interest test of Rosenbloom to focus instead on the status of the plaintiff as the determining factor in the application of malice. (32). By a five-to-four decision, the Court concluded that the overiding state interest was the "compensation of individuals," based on "the essential dignity and worth of every human being." (33).

Public figures were defined as persons who "have voluntarily thrust themselves to the forefront of particular public controversies" and "usually enjoy significantly greater access to the channels of effective communication." (34). In addition, the Court established the classification of limited public figure, defined as "an individual (who) voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (35).

One of the rationales for abandoning Rosenbloom was that it required courts to define matters of public interest, a "notoriously slippery undertaking," as Justice Roberts observed in her Bank of Oregon dissent. (36). Yet the Gertz decision made "public controversy" central to the concept of public figure while at the same time declining to define that term. To muddy the waters even further, Time Inc. v Firestone resurrected the ghost of Rosenbloom in an issue-based analysis which concluded that the divorce action of a well-known socialite was not a subject of general interest. (37).

The Supreme Court of the United States has consistently declined to examine the corporate public figure/private figure issue. It denied writ of certiorari to the defendants in Bank of Oregon v Independent News. (38). Thus it has been left largely to state courts and lower federal courts to resolve. In the absence of clearer guidelines, the job of defining public figures is, in the words of the Southern District Court of Georgia, "much like trying to nail a jellyfish to the wall." (39). Nevertheless, three lower courts have concluded, using one or the other standard or a mixture of both, that corporations are public figures. (40).

Martin Marietta, was the the first case to rule on the corporate public/private figure issue. (41). It drew on both the issue-based analysis of Rosenbloom and the status-based analysis of Gertz to conclude that a defense contracting firm was a public figure. The District of Columbia District Court reasoned that the corporation, since it possesses no human attributes, has no private life to lose. Although she questioned its reliance on Rosenbloom, Justice Roberts of the Oregon Supreme Court agreed that Martin Marietta "accurately distills the focus of the Gertz test." (42). But mere incorporation was not enough to warrant public figure status. Issues of legitimate public interest -- the essence of Times v Sullivan -- are also required.

In Trans World Accounts, Inc. v Associated Press, the District Court for Northern California found a debt collection agency, which was embroiled in a controversy involving an alleged complaint by the Federal Trade Commission, to be a public figure based on status. (43). The Court rejected the Marietta reliance on Rosenbloom in

favor of a strict adherence to Gertz, concluding that for purposes of defamation, "the distinction between corporations and individuals is one without a difference." (44).

Another 1977 federal decision, Reliance Insurance Co. v Barron's, involved an insurance company and an article in a business publication which alleged improper business practises. (45). The Southern District Court of New York, using both the public interest considerations of Rosenbloom and the general notoriety standard of Gertz, found the insurance company to be a public figure. The Court noted that Reliance was a large, publicly-held corporation in an industry whose activities were closely regulated and monitored by state and federal government agencies. As such, its business dealings attracted continued public scrutiny.

On the state judicial level, Coronado Credit Union v KOAT Television clearly parallels the Bank of Oregon case. The New Mexico Court of Appeals, using much the same rationale as that of the three federal courts, employed the status standard of Gertz as well as the public issue standard of Rosenbloom to conclude that a credit union is a public figure. The credit union was chartered under law to serve the public, it was subject to state supervision and regulation, and its business activities were matters of vital public interest. In his opinion for the Court. Justice Donnelly concluded that credit unions "are functionally equivalent to banks. Banks have been recognized as more than a purely private enterprise." (46). Donnelly quoted an earlier New Mexico decision to support his argument: "...banks perform and important and necessary public service. It cannot be argued that they are not affected with a public interest." (47).

Patricia Nassif Fetzer, in an Iowa Law Review article, suggests that "the question of whether a corporation is a public figure should be determined on a case-by-case basis... and careful weighing of the special characteristics and societal obligations of the corporate business form." (48). Using this analysis, it becomes clear that a bank is much more than a generic corporate entity.

A bank is the repository of much of the public capital of a community. In directing the allocation of that capital through mortgages and loans, it plays a central role in the economic and social health of a community. A bank is a force of immense public power and merits constant public scrutiny on that basis alone.

Fetzer also suggests, "...that a corporation, like an individual, can be an all-purpose public figure within a limited geographical area because of its public attributes or pervasive influence within the community." (49). The Bank of Oregon satisfies both requirements. At the time of the Willamette Week article, the bank held $74 million in deposits, serving customers in 13 branch locations. (50). Headquartered in the community of Woodburn, population 11,230, a bank with such resources could not help but command great public attention. (51). Thus, a corporate entity such as the Bank of Oregon clearly merits status as a public figure regardless of which of the slippery, and oftentimes contending standards of U.S. Supreme Court analysis -- issue-based or status-based -- is employed.

In their petition for rehearing before the Oregon Supreme Court, lawyers for Willamette Week argued:

> To conclude simply that a bank does not have pervasive involvement in the affairs of society" is to ignore social realities. It is hard to imagine a non-governmental institution which has more pervasive power and influence. (52).

Banking has long been recognized as so important to the public welfare that its activities command a degree of governmental supervision unrivaled in the business world. The banking industry itself acknowledges its unique and powerful position within American society:

> Banks are more central to business and society than any other field of business. ...banking is so basic to society's needs it cannot be left unregualted. More than having 'gone public' one could say that banking is public. (53).

If the Bank of Oregon's high profile within the community of Woodburn was not enough to guarantee public figure status on a status-based analysis -- $74 million in deposits is no small sum for an institution headquartered in a community of under 12,000 people -- its decision to go public in 1974 offered a further compelling reason. (54). As Dow Jones, Inc. noted in its amicus brief before the Oregon Court of Appeals:

> Any corporation that chooses to subject itself to the public gaze for its own perceived financial advantage cannot withdraw its head, turtle-like, when people decide to talk about or even criticize it. (55).

The Oregon Supreme Court decision to grant private figure status to the Bank of Oregon because the bank lacked "general fame or notoriety" and did not exhibit "pervasive involvement in the affairs of society" is inappropriate in light of the facts. The Bank of Oregon, at the time of publication, was a high-profile pillar of

power in its local geographical area. Morever, the Court of Appeals justification for private figure status because there "was nothing in the record to suggest that the bank has been drawn into any controversy except the one created by the defendants' publication" is irrelevant where behind-the-scenes, corporate chicaneries, such as those alleged in the Willamette article, involve matters of legitimate public interest. (56). To ignore this is to abandon the intent of Times v Sullivan and every subsequent Supreme Court decision involving defamation and the press. The Dow Jones amicus brief expressed the central quandary of Bank of Oregon v Independent News, a quandary left unresolved, at least in Oregon, by the decision of the State Supreme Court:

> There is no business in any locality whose name is more likely to be 'recognized' ...more widely than a local bank, inextricably linked as it is to the business, financial, and economic lives of the places it serves and the people who live and work there. If the Bank of Oregon is not an all-purpose public figure in the communities in which it operates, it is difficult to conceive of a business that is... .(57).

CONCLUSION

If the saga of Willamette Week and the Bank of Oregon does nothing else, it draws into high relief the abysmal state of press protections from libel litigation. Constitutional defamation law, as it stands today, is at war with itself. It is based on an uneasy alliance of contending values, the resolution of which may be difficult if not impossible.

Since 1964, the Courts have sought, with little success, to reconcile the common law right of an individual to compensation for reputational damage due to defamation with rights of a free, unfettered press as guaranteed by the Constitution. In his 1974 Gertz dissent, Justice Douglas argued "...that the struggle is a quite hopeless one." (58). Other murmurings of discontent arising out of more recent federal appellate and Supreme Court decisions suggest that the privileges developed in Sullivan and Gertz have failed in their intended purpose -- to protect the press from unwarranted libel litigation. (see Appendix).

The seminal New York Times v Sullivan ruling was driven by the proposition that "...debate on public issues should be uninhibited, robust and wide open." (59). In an attempt to preclude self-censorship inspired by the threat of libel, the Supreme Court of the United States extended a degree of protection, or "breathing space," to allow the press to fulfill its public mandate.

The Gertz decision sought to insulate private individuals from unwarranted defamation by the press. To that end, the Court established the public figure/private figure criteria in an attempt to reconcile the first amendment rights of the press and the individual's right to protection from reputational damage. But in declining to address the issue of the corporation in that context, the Court in effect 'passed the buck' by leaving it to the state and lower federal courts to resolve. The result has been chaos. The threat of litigation looms greater than ever and, as the Bank of Oregon case demonstrates, the truth or falsity of the alleged libel is seldom addressed. Findings of the Iowa Libel Research Project

offer compelling evidence that libel litigation is now more often used to punish the press than to seek recompense for reputational damage. (60).

In the absence of strict definitions and coherent guidelines, the press is left wandering in a legal frontier in which there are few signposts. The Oregon Supreme Court judged the Bank of Oregon to be a private figure. Yet the Supreme Court of New Mexico, in Coronado, found a credit union to be a public figure largely because of the credit union's resemblance to a bank.

To further confuse the issue, the Supreme Court of New Jersey, in Sisler v Gannett, recently applied the public-figure malice standard to a retired bank president even though he was judged to be a private figure. (61). A Gannett newspaper, the Courier-News, had misinterpreted the facts in a story involving a loan to the ex-president and had published a retraction acknowledging its mistake. Yet the paper was accorded the full Times v Sullivan protections.

The Sisler decision is based on two recent United States Supreme Court cases that have reaffirmed the importance of the nature of speech. Dun & Bradstreet v Greenmoss Builders recognized the difference between a private figure and speech of a purely private concern and a private figure and speech of public concern. The latter, according to the Court, warrants greater constitutional protection. (62).

The other decision, Philadelphia Newspapers v Hepps, concluded that a private figure must prove the falsity of a media defendant's accusations on a matter of public concern. (63). In a clear attempt

to reconcile the issue-based analysis of Rosenbloom with the status-based analysis of Gertz, Justice O'Connor reasoned in her opinion for the Court:

> ...two forces ...may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. ...When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the Constitution still supplants the common law, but the constitutional requirements are, in at least some of their range, less forbidding... (64).

Thus, the ghost of Rosenbloom is perhaps being resurrected by the Court. And the pendulum may be swinging back again in favor of an issue-based analysis.

This confused scenario, with its lack of clear as well as consistent national guidelines, places the press in a cruel dilemma. As the Michigan Supreme Court observed in Lawrence v Fox: "The more serious the charge of wrongdoing... (the) more urgent the need for its airing. Yet, the more serious the charge, the greater the libel." (65).

At present, the only options available to the press are self-censorship or the kind of situation in which the Willamette Week found itself embroiled. The Willamette Week ran a well-researched and well-documented story on a matter that would, by most any definition, command legitimate public interest -- the alleged fiduciary shenanigans of a bank and its president. Yet the small weekly, with a circulation of only 15,000 at the time, found itself locked into a $7.4 million libel suit which dragged on for eight

years without ever addressing the veracity of the allegations made in the original news story..

The newspaper had been purchased by the Eugene Register-Guard a year prior to the publication of the story and it had, as a result, ample legal resources upon which to draw. But what would happen to a similarly-sized, independent newspaper in such a situation, a paper without the protection of a powerful corporate godfather? In the absence of libel insurance -- and increased litigation has made such insurance expensive -- the legal costs alone would be enough to drag a small publication under.

In the end, it is the public that suffers. As Richard Meeker, one of the defendants in Bank of Oregon, predicted after the Court of Appeals decision: "This will create a severe interference with the press' ability to cover such crucial areas of modern affairs as business... the chilling effect is unconscionable." (66).

The Supreme Court of the United States must reexamine constitutional defamation law as it applies to corporations. The Gertz public figure/private figure test, which was developed to protect personal reputation, is inappropriate when applied to a corporation which, by definition, is devoid of human qualities and has no personal reputation to lose. In cases involving a corporate entity such as the Bank of Oregon, the Rosenbloom public interest test should be fully restored. A return to an issue-based analysis in this limited context would properly balance first amendment concerns with the state's legitimate interest in protecting corporate

reputation. This approach would be consistent with the recent Hepps decision which recognized the higher consitutional status of speech involving matters of public concern. (67).

As a more general remedy, the Court would do well to expand the Hepps requirement that a private figure plaintiff prove the falsity of a media defendant's allegations where the issue is of legitimate public concern. As Randall P. Bezanson suggests in the Iowa Law Review:

> If the common law action were reformulated to inquire, first, into falsity and reputational harm, with the plaintiff having a heavy burden of proof, most privilege issues could be greatly simplified or even eliminated, and the risk to plaintiffs that falsity could not be proved would provide a powerful and needed disincentive to suit. (68).

At present, the constitutional privilege of negligence or actual malice is "...the central legal issue in nearly ninety percent of the libel cases brought against the media." (69). The truth or falsity of press allegations, as Bank of Oregon demonstrates, is rarely examined and seldom resolved in the courts.

The privileges designed to protect the press have, ironically, become a source of its travail. For most plaintiffs, the legal process itself is more important than the outcome. Prolonged litigation -- eight years in the case of Willamette Week -- is often wielded as an instrument of punishment, forcing the press to seek shelter in self-censorship. The lack of clear and consistent national guidelines encourages litigation without serving the interests of truth.

By establishing the primacy of falsity and reputational damage, with the burden of proof on the plaintiffs, the Court would go a long way in curtailing frivolous and unnecessarily punitive libel suits. A return to the Rosenbloom public interest test in cases involving corporations would banish much of the confusion and uncertainty without violating the intent of Gertz. Thus, the press would be freer to perform its vital public function.

EPILOGUE

An advertisement in the Nov. 13, 1986 edition of Willamette Week announced the formal resolution of Bank of Oregon v Independent Newspapers. The concluding paragraphs read:

> With this paid advertisement, the parties announce that the lawsuit has been settled to their satisfaction. In addition, Independent News wishes to make the following statement:
>
> "It was not our intention to impute any illegal conduct either to Homer Wadsworth or to the Bank of Oregon. We regret any misunderstanding that may have occurred."

The terms of the settlement were not announced.

In the years that intervened between the onset of the case in 1979 and its resolution, Key Bank, a corporation based in New York, purchased the Bank of Oregon. Homer "Spike" Wadsworth, whose grandfather founded the Bank of Oregon, is no longer involved in banking. Richard Meeker, one of the defendants named in the libel lawsuit, is now owner/publisher of Willamette Week. He reports that Key Bank is an occasional advertiser in his newspaper.

NOTES

(1) Ronald Buel and Richard Meeker, "A Lot Off the Top," Willamette Week 28 Aug. 78: 1.

(2) ibid. 4.

(3) ibid. 1.

(4) Richard Meeker, telephone interview, 25 Feb. 87.

(5) 376 U.S. 254. (1964).

(6) 403 U.S. 29. (1971).

(7) 418 U.S. 323. (1974).

(8) Bank of Oregon v Independent News 670 p.2d at 618 (Or.Ct.App. 1983).

(9) 670 P.2d 616.

(10) 94 S.Ct. 2997 (1974).

(11) 633 F.2d 592 (1980).

(12) 94 S.Ct. at 3010.

(13) 670 P.2d at 621 (quoting 633 P2d at 592).

(14) 94 S.Ct. at 3011.

(15) 693 P.2d at 42 (1985).

(16) 417 F.Supp. 947 (D.D.C. 1976).

(17) 693 P.2d at 42.

(18) 656 P.2d 896 (N.M. Ct.App. 1982).

(19) 693 P.2d at 46 (quoting 417 F.Supp. at 955).

(20) 375 So.2d 239 (Ala. 1979).

(21) 442 F.Supp. 1341 (S.D.N.Y.1977).

(22) 693 P.2d at 47.

(23) 376 U.S. 254 (1964).

(24) Bruce Smith, Roger Saydack and Douglass Mitchell. "Petition to the Supreme Court of the State of Oregon to Review the Decision of the Court of Appeals." 27 July 83: 14.

(25) ibid. 12.

(26) 376 U.S. at 270, 279.

(27) 376 U.S. at 272 (quoting NAACP v Button 371 U.S. at 433).

(28) 388 U.S. 130 (1967).

(29) 403 U.S. 29 (1971).

(30) Nessa E. Moll, "In Search of the Corporate Public Figure: Defamation of the Corporation," Hofstra Law Review, Winter 1978, vol. 6: 344 (quoting Justice Brennan, 403 U.S. at 43 (1971)).

(31) Moll. 344.

(32) 418 U.S. 323 (1974).

(33) 418 U.S. at 341 (citing Rosenblatt v Baer 383 U.S. at 92 (1966)).

(34) 418 U.S. at 344-345.

(35) ibid. at 351.

(36) 693 P.2d at 46.

(37) 424 U.S. 448 (1976).

(38) 106 S.Ct. 84.

(39) Rosanova v Playboy Enterprises 411 F.Supp. at 443 (1976).

(40) Moll. 350.

(41) 417 F.Supp. 947 (D.D.C. 1976).

(42) 693 P.2d at 46.

(43) 425 F.Supp. 814 (N.D.Cal. 1977).

(44) ibid. at 819-820.

(45) 442 F.Supp. 1341 (S.D.N.Y. 1977).

(46) 656 P.2d at 904.

(47) ibid. at 904 (quoting Lynch v Sante Fe National Bank 627 P.2d 1247 (N.M. Ct.App. 1981) quoting Hy-Grade Oil v New Jersey Bank 350 A.2d 279 (N.J.Supp. 1975)).

(48) Patricia Nassif Fetzer, "The Corporate Defamation Plaintiff as First Amendment 'Public Figure': Nailing the Jellyfish," Iowa Law Review, 1982, vol. 68: 84.

(49) Fetzer, 47.

(50) Buel. 5.

(51) Donald A. Sterling Jr., "Libel Suit Prelims Portentous for

Public, Press," Portland Oregonian, 23 Oct. 1983, C3.

(52) Bruce Smith, Roger Saydack, Douglass Mitchell, "Petition to Rehear the Supreme Court's Review of the Decision of the Court of Appeals," 28 Jan. 1985: 14.

(53) Dow Jones & Co., "Brief as Amicus Curiae to the Supreme Court of the State of Oregon," 10 Nov. 1983: 13, quoting W. Baughn & C. Walker, eds., The Banker's Handbook (revised edition 1978) no citation.

(54) Portland Oregonian, 5 March 1974: 15.

(55) Dow. 19.

(56) 670 P.2d at 621.

(57) Dow. 8.

(58) 94 S.Ct. 2997 at 3015 (1974).

(59) 376 U.S. 254.

(60) Randall P. Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight," Iowa Law Review, 1985, vol. 71: 227.

(61) 516 A.2d at 1083 (N.J. 1986).

(62) 105 S.Ct. 2939. (1985).

(63) 106 S.Ct. 1558. (1986).

(64) 106 S.Ct. at 1562.

(65) Smith et.al., "Petition to Rehear the Supreme Court's Review," 11, quoting 97 N.W.2d at 720.

(66) Portland Oregonian, 13 Oct. 1983: B4.

(67) 106 S.Ct. 1558.

(68) Bezanson, 233.

(69) Bezanson, 228.

APPENDIX

Opinions in two recent cases on the federal level have called for a rethinking of the libel standards that have evolved since Times-Sullivan. In Dun & Bradstreet v Greenmoss Builders, then Chief Justice Burger and Justice White of the Supreme Court suggested that Gertz be overruled. Justice White argued:

> I joined in the judgment and opinion of New York Times. ...But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. (105 S.Ct. at 2950 (1985)).
> ...I dissented in Gertz, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values. ...I suspect that the press would be no worse off ...if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. A legislative solution to the damages problem would also be appropriate. (105 S.Ct. at 2953).

The U.S. Court of Appeals, District of Columbia, discussed the failure of Sullivan in the Ollman v Evans decision. Justice Bork wrote the opinion with four justices concurring. Bork argued:

> Sullivan seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do. Instead, ...a remarkable upsurge in libel actions ...has threatened to impose a self-censorship on the press. (11 Med. L. Rep. at 1455 (1984)).
> (The solution) requires a consideration of the totality of the circumstances that provide the context in which the statement occurs... Hard categories and sharply defined principles are admirable, if they are available, but usually, in the world in which we live, ...they do not stand up when put to the test of hard cases. (11 Med. L. Rep. at 1456.)

Justice Bork is reported by many observers to be the next appointment to the Supreme Court, should an opening occur in the remainder of President Reagan's term.